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Newark Portfolio JV, LLC *and* Residential Laborers Local 55, Laborers International Union of North America. Case 22–CA–100534

June 5, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Residential Laborers Local 55, Laborers International Union of North America (the Union) on March 15, 2013, and an amended charge filed March 19, 2013, the Acting General Counsel issued the complaint on March 28, 2013, alleging that Newark Portfolio JV, LLC (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 22–RC–081108. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On April 17, 2013, the Acting General Counsel filed a Motion for Summary Judgment. On April 18, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On May 31, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 124. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

On November 12, 2014, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 22–CA–100534 and 22–RC–081108, which is reported at 361 NLRB No. 98. That Decision provided leave to the General Counsel to amend the complaint on or before November 24, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 12, 2014 certification of representative issued. Thereafter, the Respondent and the General Counsel filed responses to the Notice to Show Cause.

On February 6, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board's Rules and Regulations. Thereafter, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, and directed that the Respondent file an answer to the amended complaint on or before February 27, 2015, and that cause be shown, in writing, on or before March 6, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board.

On February 24, 2015, the Respondent filed an answer to the amended complaint. On March 3, 2015, the General Counsel filed a statement in support of summary judgment and, on March 6, 2015, the Respondent filed a response.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis of its objections to conduct that allegedly affected the results of the election in the underlying representation proceeding.

[1] The amended complaint adds November 12, 2014, as the date the Board certified the Union as the exclusive collective-bargaining representative of the unit employees and alleges that about March 5, 2013, and January 15, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and that on March 15, 2013, and January 15, 2015, the Respondent refused in writing to do so, and continues to refuse to do so.

The amended answer admits the factual allegations of the complaint, and reiterates the arguments made in the underlying representation proceeding that the Union engaged in conduct that interfered with the results of the election. The amended answer also argues that because the Board lacked a quorum from January 4, 2012, until August 7, 2013, see *NLRB v. Noel Canning*, supra, the Board and its agents could not have certified the Union prior to August 7, 2013. However, the Board certified the Union on November 12, 2014. Further, to the extent the Respondent's answer asserts that the Regional Director lacked authority to process the case prior to August 7, 2013, that argument lacks merit. See *Mission Produce, Inc.*, 362 NLRB No. 15, slip op. at 1–2 (2015).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Delaware corporation, has been engaged in the management of residential houses and apartments at its Newark and Irvington, New Jersey facilities.

During the 12-month period preceding the issuance of the complaint, the Respondent has derived gross revenues in excess of $500,000, and purchased and received at its Newark and Irvington, New Jersey facilities, goods and supplies valued in excess of $5000 directly from suppliers located within the State of New Jersey, which suppliers are directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Residential Laborers Local 55, Laborers International Union of North America, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following a representation election held on June 27, 2012, the Union was certified on November 12, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time on site superintendents, porters, and maintenance employees employed by the Employer at its Newark, New Jersey facility; excluding all managerial employees, office and clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About March 5, 2013, and January 15, 2015, the Union requested in writing that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since about March 15, 2013, and continuing to date, the Respondent has declined to recognize and bargain collectively with the Union. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[3]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229

[2] The Respondent's demand that the complaint be dismissed is, therefore, denied.

[3] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

(1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Newark Portfolio JV, LLC, Newark and Irvington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time on site superintendents, porters, and maintenance employees employed by the Employer at its Newark, New Jersey facility; excluding all managerial employees, office and clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Newark, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about March 15, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 5, 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Residential Laborers Local 55, Laborers International Union of North America as the exclusive collective-bargaining representative of the employees in the bargaining unit.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time on site superintendents, porters, and maintenance employees employed by us at our Newark, New Jersey facility; excluding all managerial employees, office and clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

NEWARK PORTFOLIO JV, LLC

The Board's decision can be found at www.nlrb.gov/case/22-CA-100534 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.